IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

GEORGE WATTS — PLAINTIFF

V. — CIVIL ACTION NO. 2:98CV-13-B-B

ZURICH-AMERICAN INSURANCE COMPANY AND ZURICH INSURANCE COMPANY OF ILLINOIS — DEFENDANTS

MEMORANDUM OPINION

This cause comes before the court on the plaintiff's motion for partial summary judgment and the defendants' motion for summary judgment. Upon due consideration of the parties' memoranda and exhibits, the court is ready to rule.

FACTS

In May 1996, the plaintiff was an hourly employee working as a mechanic for G. B. "Boots" Smith Corporation. Zurich Insurance Company provided commercial auto insurance to G. B. "Boots" Smith Corporation. On May 30, 1996, around 6:47 p.m., the plaintiff was driving his personal vehicle in Tunica County, Mississippi. At that time, a vehicle driven by a third party crossed the center line and collided with the plaintiff's vehicle. The third party's insurance provider paid the plaintiff its policy's liability limit of $50,000. The plaintiff's personal insurance policy provided him uninsured motorist coverage in the amount of $50,000 and medical benefits in the amount of $2,000.

The plaintiff filed this cause against the defendants claiming he is an insured and is entitled to benefits under the uninsured motorist and medical payments coverages of G. B. "Boots" Smith Corporation's insurance policy with the defendants. The plaintiff's claim relies on the Hired Autos Endorsement of the defendants' policy which provides in pertinent part the following:

> A. Any "auto" described in the Schedule will be considered a covered "auto" you own and not a covered "auto" you hire, borrow or lease under the coverage for which it is a covered "auto".
>
> B. **CHANGES IN LIABILITY COVERAGE**
> The following is added to WHO IS AN INSURED: While any covered "auto"

> described in the Schedule is rented or leased to you and is being used by or for you, its owner or anyone else from whom you rent or lease it is an "insured" but only for that covered "auto".

Emphasis in original. The endorsement also provides the following: "If no entry appears above [in the Schedule Description of Auto], information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement." The Business Auto Declarations includes as "Item Four – Schedule of Hired or Borrowed Covered Auto Coverage and Premiums. Liability Coverage – Rating Basis, Cost of Hire" the provision that automobiles in Mississippi are covered "if any."

LAW

On a motion for summary judgment, the movant has the initial burden of showing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 275 (1986) ("the burden on the moving party may be discharged by 'showing' . . . that there is an absence of evidence to support the non-moving party's case"). Under Rule 56(e) of the Federal Rules of Civil Procedure, the burden shifts to the non-movant to "go beyond the pleadings and by . . . affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex Corp., 477 U.S. at 324, 91 L. Ed. 2d at 274. That burden is not discharged by "mere allegations or denials." Fed. R. Civ. P. 56(e). All legitimate factual inferences must be made in favor of the non-movant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 216 (1986). Rule 56(c) mandates the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322, 91 L. Ed. 2d at 273. Before finding that no genuine issue for trial exists, the court must first be satisfied that no reasonable trier of fact could find for the non-movant. Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 552 (1986).

Under Mississippi law, where an insurance policy is plain and unambiguous, the court must

construe the instrument exactly as written. Reliance Nat. Ins. Co. v. Estate of Tomlinson, 171 F.3d 1033, 1035 (5th Cir. 1999). The court also must read the policy as a whole, thereby giving effect to all provisions. Reliance Nat. Ins. Co., 171 F.3d at 1035. Although ambiguities of an insurance policy are construed against the insurer, a court must refrain from altering or changing a policy where terms are unambiguous, despite resulting hardship on the insured. Centennial Ins. Co. v. Ryder Truck Rental, Inc., 149 F.3d 378, 383 (5th Cir. 1998).

Under the Hired Autos Endorsement, it is admitted that the plaintiff's personal vehicle is not specifically listed under the Schedule of description of autos. The Schedule is supplemented by a reference to the Declarations for applicable information if no entry appears in the Schedule. The plaintiff contends that although his personal vehicle is not specifically listed in the Schedule of the endorsement, the Declarations show that the plaintiff's personal vehicle is covered by this endorsement because it is included as a vehicle hired in Mississippi, "if any." This argument is not well-taken by the court. It is clear from the Declarations under Item Four's heading, the Schedule of Hired or Borrowed Covered Autos, that this Declaration is limited to liability coverage and does not include coverage for uninsured or underinsured motorist coverage. Therefore, the court finds that the plaintiff's personal vehicle is not a covered auto as it is neither described or listed in either the Hired Autos Endorsement or the Declarations, and thus, the plaintiff should not be entitled to recover uninsured or underinsured motorist coverage from the defendants' insurance policy.

The plaintiff's contentions also fail according to section 1 of the Business Auto Coverage Form of the policy which defines descriptions of covered autos under the policy. Subsection A(8) defines "hired autos" as: "Only those 'autos' you lease, hire, rent or borrow. This does not include any 'auto' you lease, hire, rent, or borrow from any of your employees or partners or members of their households." This provision of the Business Auto Coverage Form is not changed or altered by the Hired Autos Endorsement in any manner. A reading of the clear language of this provision indicates that, as an employee, the plaintiff's personal vehicle cannot be included for coverage as a hired auto. The provision clearly states that any auto that is leased, hired, rented, or borrowed from

any employee is not considered a hired auto under the policy. Therefore, the court finds that the plaintiff's personal vehicle should not be considered a hired auto under the Business Auto Coverage Form, and there should be no uninsured or underinsured motor coverage available to the plaintiff through the provisions of the defendants' insurance policy.

CONCLUSION

For the foregoing reasons, the court finds that the plaintiff's motion for partial summary judgment should be denied and that defendants' motion for summary judgment should be granted.[1] An order will issue accordingly.

THIS, the ____ day of December, 1999.

_____
NEAL B. BIGGERS, JR.
CHIEF JUDGE

[1]The questions of facts concerning whether the plaintiff's personal vehicle was actually hired, leased, or rented by G. B. "Boots" Smith Corporation and whether the plaintiff was within the scope of his employment at the time of the accident are considered moot because of the finding that the plaintiff is not an insured under the defendants' policy.